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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CLARK COUNTY, NEVADA,
Petitioner,
v.
FRANK BRISCOE COMPANY, INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a government entity invites bids for performance of a construction contract within a set time, does the successful bidding contractor warrant that the project will be completed within that time period (as prior federal courts have held), or does the government warrant that the project will be completed within the specified time (as the Ninth Circuit held here, in direct conflict with prior authority)?

2. Did the Ninth Circuit infringe Petitioner Clark County's right to sovereign immunity, in conflict with controlling authority of the Nevada Supreme Court, by holding that the County waived the express statutory requirement of strict compliance with state law notice-of-claim provisions when, in compliance with the Federal Rules of Civil Procedure, it filed a compulsory counterclaim against Respondent corporation?

3. Did the Ninth Circuit deny Clark County a fundamentally fair trial when it affirmed the district court's orders:

(a) to continue the trial for twelve weeks, over Clark County's objection, so that the trial judge would avoid FICA deductions from his Senior Judge's salary;

(b) to submit to the jury, over Clark County's objection and without any opportunity to rebut, charts Respondent prepared that were the sole evidence of causal links between the alleged delay-causing events and the alleged breaches of contract; and

(c) to submit to the jury concededly "poorly drafted" special interrogatories "susceptible of misconstruction and overlap," encouraging the award of duplicative damages?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 606, and is reprinted in the Appendix at 2a. The decision and order on motions to dismiss of the District Court for the District of Nevada is reported at 643 F. Supp. 93, and is reprinted in the Appendix at 95a.

JURISDICTION

The Ninth Circuit entered judgment on September 15, 1988, affirming the district court judgment. The Ninth Circuit denied Clark County's petition for rehearing and suggestion for rehearing en banc on December 2, 1988. On February 23, 1989, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including April 1, 1989. Supreme Court Rule 20.4; 28 U.S.C. § 2101(c).

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Ninth Circuit.

STATUTORY PROVISIONS

Section 244.250 of the Nevada Revised Statues provides:

> 1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.
>
> 2. No claim or account against any county shall be audited, allowed, or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

STATEMENT OF THE CASE

In 1976, pursuant to a federal grant under the Clean Water Act of 1972, Petitioner Clark County, Nevada (the "County"), invited contractors to bid on a wastewater treatment plant construction contract. Bidders had access to detailed plans and specifications for the project, including a requirement that the project be completed within 1200 days. Before formulating and submitting their bids, bidders had an opportunity to evaluate the project requirements and, in particular, the required completion date, in light of their own capabilities.

Respondent Frank Briscoe Company, Inc. ("Briscoe"), a large construction firm headquartered in New Jersey, submitted the low bid of $52.3 million, and the County awarded the contract to Briscoe. As part of the construction agreement, Briscoe expressly promised to complete the project within 1200 days and to pay liquidated damages of $5,000.00 per day for completion delays.

During the construction of the plant, disputes arose between the parties concerning the quality of Briscoe's performance and the impact of particular contract requirements on Briscoe's time and cost of performance. Ultimately, the project was delayed 667 days – nearly two years.

In May 1980, while the plant was under construction, Briscoe, invoking diversity jurisdiction, filed a complaint for breach of contract against the County and other defendants. Briscoe sought only equitable and declaratory relief – specific performance and a disclaimer of liability – from the County, although it did seek compensatory damages from other named defendants. In compliance with the Federal Rules of Civil Procedure, the County filed a compulsory counterclaim for breach of contract.

Without ever filing a notice of claim with the County, Briscoe responded to the County's compulsory counterclaim by filing a "counterclaim-in-reply," seeking damages "in as yet undetermined amount." More than three years later, the district court granted Briscoe's motion to file an amended complaint seeking specific damages for its "counterclaim-in-reply."

In its motion to dismiss the amended complaint, the County argued that the action was barred by sovereign immunity because Briscoe had failed to file the notice of claim expressly required by section 244.250 of the Nevada Revised Statutes. The district court denied the motion to dismiss without prejudice. The court acknowledged that section 244.250 applied, that Briscoe had not formally complied with the statute, and that compliance was not waived under *State v. Capital Convalescent Center,* 92 Nev. 147, 151-52, 547 P.2d 677, 680 (1976) (state waives claims statute when state sues first). The court nonetheless denied the motion on the ground that Briscoe had "substantially complied" with the purpose of the statute (Appendix, hereafter "App." 111a).

The jury trial began on November 13, 1985. After twenty days of proceedings, the trial was adjourned for the holidays. On December 30, 1985, the district court sua sponte extended the recess until March 3, 1986. Judge Foley attached to his minute order a letter from the Director of the Administrative Office of the United States Courts, which advised Senior United States Judges wishing to avoid having FICA taxes withdrawn from their salaries "to cease performing judicial duties during the first 60 to 90 days of 1986." (App. 114a).

Responding to the lengthy continuance,[1] the County moved for a mistrial, claiming that the continuance was prejudicial. The court denied the motion (App. 85a).

After the close of Briscoe's case, the County moved for a directed verdict, and again raised as a defense Briscoe's failure to file the notice of claim required by statute. The court again denied the motion. This time, however, the court held that Briscoe's "counterclaim-in-reply" had itself been a compulsory counterclaim and therefore the notice-of-claim statute did not apply under the *Capital Convalescent* rule (App. 65a).[2]

At the end of the trial, immediately before the jury retired, the judge authorized Briscoe to submit to the jury argumentative reference charts it had created to illustrate its damage theories, even though the judge acknowledged that the charts had not been introduced into evidence and the County had had no opportunity to rebut the charts (Reporter's Transcript, hereafter "RT" 15,636, 15,640). The County's objections were ignored.

The district court also instructed the jury, over the County's objection, that

> The contract implies a warranty by the County that Briscoe, if it complies with the contract documents,

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[1]The district court issued another order extending the continuance to March 11.

[2]At the oral argument on the County's motion for judgment notwithstanding the verdict, the court reversed itself again and repudiated its reliance on *Capital Convalescent;* the court stated that it was not basing its decision on "jurisdictional grounds or constitutional grounds or purely legal grounds." Instead the court "just doesn't think it would apply." (January 12, 1987 Reporter's Transcript at 74-75).

> would be able to complete the work within the contemplated period of time.

(RT 15,514-15).[3]

This erroneous instruction resulted in the jury returning one of the largest verdicts in Nevada history against the County. The district court reduced the verdict by a remittitur of $275,000, to reflect Briscoe's promise to pay liquidated damages of $5,000 per day for completion delays. Consequently, the final judgment entered against the county was for $24.3 million (App. 22a).

On September 15, 1988, the Ninth Circuit affirmed the judgment. Even though Briscoe had first filed suit, the court improperly applied *Capital Convalescent,* and held that Briscoe could maintain an action for money damages without filing a notice of claim (App. 7a-11a).

The court of appeals also upheld the lower court's instruction that the County had impliedly warranted that the contract was performable within the stated time period. Although the court also found that the district court had erred in failing to deliver the County's proffered instruction – that Briscoe had warranted that it could complete the project within the specified time period – the court erroneously held that this error was harmless (App. 12a-15a).

The court further found that continuing the trial nine weeks to avoid FICA deductions was "somewhat unusual," that the unrebutted charts lacked any evidentiary basis, were vague,

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[3]The district court refused to deliver the County's requested instruction that Briscoe, by entering into the contract, warranted that it could complete the project within the specified time.

confusing, and absurd, and that the special interrogatories were "poorly drafted" and "susceptible of misconstruction and overlap." Nonetheless, the court held these errors harmless as well (App. 12a, 15a-21a). Subsequently, the Court rejected a petition for rehearing and a suggestion for rehearing en banc (App. 1a).

Each of these errors standing alone are sufficient to require reversal. The combination, though, firmly establishes that the decisions below do not comport with existing case authority and denied the County a fair trial.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT RULE CONFLICTS WITH SETTLED PRINCIPLES AND DRASTICALLY SHIFTS TO THE GOVERNMENT ANY RISK OF UNTIMELY COMPLETION OF CONSTRUCTION CONTRACTS

The Ninth Circuit's holding that the government warrants that the contracting party can complete the contract within the contractually prescribed time period drastically shifts the allocation of risk between governmental entities and contractors in construction law and, if followed by other courts, could have a staggering budgetary impact on the United States, each State, and each of their subdivisions. This Ninth Circuit holding conflicts with an often-cited landmark decision of the Court of Claims, and unexpectedly opens up to challenge a previously established set of rights and duties involving public works construction contracts (and possibly even private construction contracts). Consequently, there is an undisputed need for resolution of this conflict between the Ninth Circuit and other federal courts.

A. The Decision Below Conflicts With Settled Principles Set Forth By the Court of Claims

A construction contract is fundamentally a risk allocation device. Briscoe, the successful bidder here, expressly promised the County in the construction contract that it would complete the project within 1200 days and would pay liquidated damages for delay. Briscoe thus expressly assumed the risk that it would not complete the project on time. Briscoe's express assumption of risk of any delay comports with a well-developed line of construction contract decisions that has held that a *contractor,* by entering into the contract, warrants that it will complete the project by the due date, and assumes the risk that it will not complete the project on time. *American Ship Bldg. Co. v. United States,* 654 F.2d 75, 78 (Ct. Cl. 1981).[4]

The reasons for allocating the risk of untimely completion of the contract to the contractor are straightforward. The contractor examines the specifications and makes a business judgment, based on the nature of the specifications and its own capabilities, whether it can complete the contract by the due date. As the *American Ship Building* case recognizes, the contractor knows best its capabilities, and knows best the labor and equipment it is willing to commit to the project. *Id.* Because the government does not normally have access to the bidder's capabilities, intentions, or resources, the government cannot be held to

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[4]*Accord J.F. Shea Co. v. United States,* 4 Cl. Ct. 46 (1983); *Development Management Consultants, Inc.,* 85-3 B.C.A. (CCH) ¶ 18,338, at 91,972 (1985); *Dewey Elecs. Corp.,* 85-3 B.C.A. (CCH) ¶ 18,228, at 91,516 (1985); *Finast Metal Prods., Inc.,* 85-1 B.C.A. (CCH) ¶ 17,873, at 89,521 (1985); *P&L Inv. Corp.,* 83-1 B.C.A. (CCH) ¶ 16,285, at 80,914 (1983); *Paragon Corp.,* 83-1 B.C.A. (CCH) ¶ 16,521 (1983); *James Walford Constr. Co.,* 83-1 B.C.A. (CCH) ¶ 16,277 at 80,875 (1982).

impliedly warrant that the bidder will complete the project within the contractual time limit. Rather, the government invites those who are willing to represent that they can perform within the specified time to submit bids. *Id.*

Yet, in the face of this analysis, the Ninth Circuit rejected this longstanding authority and expressly held that the governmental entity impliedly warrants that the contract was performable within the stated time frame. The contract did not refer to Briscoe's capabilities, resources, or require any particular staffing or equipping of the construction project. Thus, if Briscoe followed the contract documents, but incurred delay because, for example, it understaffed the project or had insufficient equipment at the project, the jury would still have been *required* under the lower court's erroneous instruction to hold the County liable for any delay.

The result directly conflicts with *American Ship Building* and its progeny. The holding drastically reallocates from the contractor to the owner the risk of untimely performance in construction contracts generally and places a staggering budgetary burden on governmental entities, which for the first time will be held to warrant the contractor's time of completion whenever a contract specifies a completion date. In order to avoid the application of this erroneous rule in other cases, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

B. The Court of Appeals Confused the Warranty of Adequate Specifications with the Warranty of Timely Completion

The court of appeals correctly noted that the County, by requiring construction according to its specifications, impliedly warranted that the specifications would be suitable, and that the County would be liable for delays caused by faulty

specifications. *See United States v. Spearin*, 248 U.S. 132 (1918). But this warranty of adequate specifications applies only to delays *caused by faulty specifications;* no decision has ever before held that the owner warrants not only the adequacy of specifications, but also that the contractor will be able to complete the project on time, regardless of the adequacy of the specifications. Logically, only the contractor has sufficient knowledge to be fairly allocated the risk of untimely completion. Thus, the opinion transformed the *Spearin* warranty of adequate specifications into an unprecedented warranty of timely completion by the County.[5]

The potential impact of the new rule on public works contracts throughout the nation is starkly revealed by the magnitude of the error in this case. Pursuant to special interrogatories, the jury attributed 612 days of delay to the County. Because the jury attributed only 82 days of delay to faulty specifications, 530 days were attributed to reasons other than faulty specifications. More simply put, the jury could have wrongfully attributed to the conduct of the County more than eighty percent of the damages awarded.

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[5]The opinion notes that the time-of-completion warranty instruction tracks language in two Court of Claims opinions construing *Spearin*. Although both cases used language similar to the instruction here, neither case supports the instruction. In *Laburnam Constr. Corp. v. United States*, 325 F.2d 451, 457 (Ct. Cl. 1963), the court noted that "the critical factor in this case is that *all* of the delay to which plaintiff was subjected came about because the specifications were deficient," and noted: "*If* faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover damages for the defendant's breach of its implied warranty." (Emphases added.) In *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965), the court explicitly held that the contractor had "assumed the substantial risk of completing the project within the tight schedule of 540 days."

Under *Spearin*, the County could have been liable under an implied warranty theory for the 82-day delay caused by faulty specifications, but not the 530 days attributed to other causes. Yet the new rule promulgated by the court of appeals allowed the jury to attribute those 530 days to the breach of the purported implied warranty of timely completion.

C. The Error Was Not Harmless

The court of appeals correctly noted that the trial court erred in failing to give a proper instruction, submitted by the County, that Briscoe, by entering into the contract, warranted that it could complete the contract within the specified time. See note 3, *supra*. The Court erred, however, in concluding that the error was harmless on two independent grounds.

The court first reasoned that a "roughly equivalent" instruction was given (App. 15a). But that instruction stated only that Briscoe had a duty to see that the job was performed in a *workmanlike manner*, according to the contract plans and specifications. In light of the explicit instruction that the County warranted the *time* of completion, the jury could not have read this "workmanlike manner" instruction to impose on Briscoe a warranty that it would complete the project by the agreed-upon completion date.[6]

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[6]Moreover, the two instructions are mutually inconsistent. The risk of noncompletion by the due date must fall on one party or the other. In construction contract cases, it is the contractor, not the owner, who should assume the risk of untimely completion. Liquidated damages provisions, like the one here, evidence the contracting parties' intent that the contractor is solely responsible for timely performance.

The court of appeals also concluded that the district court's $275,000 remittitur covering the 55 days of delay the jury found was attributable to Briscoe sufficiently compensated the County, because "[a] time of completion warranty by Briscoe would have been excused to the extent the delay was caused by the County." (App. 15a). This reasoning overlooks the probability that, given correct instructions, the jury would not have attributed delay to the County at all, except for the 82 days due to faulty specifications. Under the instructions as given, if the jury was unsure who caused a delay, it was required to impose liability against the County; properly instructed, however, the jury would not have imposed liability on the County, but instead may have imposed liability on Briscoe.

The combination of permitting the jury to be instructed that the County warrants that the contractor can complete the agreement during the fixed time frame, along with refusing to instruct the jury that the contractor had warranted that it would be able to complete the contract within the contractually agreed-upon period, permitted the jury to award damages on a strict liability basis. This is simply wrong and hardly harmless error.

II. THE COURT OF APPEALS INFRINGED NEVADA'S SOVEREIGN IMMUNITY BY HOLDING THAT A GOVERNMENTAL ENTITY WAIVES THE STATUTORY REQUIREMENT OF STRICT COMPLIANCE WITH A NOTICE-OF-CLAIM RULE BY FILING A COMPULSORY COUNTERCLAIM

Nevada, like the United States, conditions its waiver of sovereign immunity on the requirement that claimants file a notice of claim with a government entity before a suit for money

damages is initiated against the entity.[7] The purpose of a notice of claim statute is to: (1) apprise the agency of the claim; (2) permit the agency to investigate the claim and institute remedial actions; (3) encourage early settlement without litigation; and (4) notify the appropriate budgetary officers. *E.g., Hansen-Neiderhauser, Inc. v. Nevada State Tax Comm'n,* 81 Nev. 307, 402 P.2d 480, 482 (1965); *City of Reno v. Fields,* 69 Nev. 300, 250 P.2d 140, 143 (1952); *Mammo v. State,* 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983). Nevada's notice of claim statue on its face must be "strictly complied with." Here, the Ninth Circuit and the district court ignored the express language and purpose of the statute, and controlling case authority. In fact, the court of appeals invites litigants to circumvent notice-of-claim statutes by first seeking declaratory relief and later amending the action to seek damages. This result should not be countenanced.

A. The Court Overlooked the Purposes of Notice-of-Claim Statutes

In its decision, the court of appeals limited its focus to one purpose of the notice statute – to avoid surprise. The court apparently reasoned that the County had actual knowledge of the contract dispute, and this knowledge excused Briscoe from complying with the notice statute because the County was not "surprised." (App. 11a).

This approach frustrates other important statutory goals, including the paramount goal of encouraging settlement *without* litigation. Moreover, the decision in this regard conflicts with the overwhelming weight of authority that actual knowledge by

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[7]The notice-of-claim statute does not apply to an action where no damages are claimed. *Hart v. City of Las Vegas,* 73 Nev. 29, 307 P. 2d 617 (1957).

the government of the underlying events cannot substitute for compliance with a notice statute. *See* Annotation, *Actual Notice or Knowledge by Governmental Body or Officer of Injury or Incident Resulting in Injury as Constituting Required Claim or Notice of Claim for Injury – Modern Status*, 7 A.L.R.4th 1063, 1065 (1981). Indeed, the very essence of the notice of claim statute is to prevent disputes over such issues as actual knowledge from unnecessarily clogging the already overburdened judicial system.

B. The Holding Infringes Nevada's Sovereign Immunity

Under the Ninth Circuit's decision, a claimant need not bother to comply with the technicalities of a notice requirement. All it need do is precisely what Briscoe did here – file an action for equitable or declaratory relief, where no notice is required. So long as the agency has a counterclaim that it chooses not to abandon, the claimant can then sue for damages in a "counterclaim-in-reply."[8] Thus, the Ninth Circuit's holding not only subverts the legitimate purposes of notice statutes, but also runs afoul of the constitutional barrier of sovereign immunity. Whenever the State entity must file a compulsory counterclaim, the court's rationale frustrates the legitimate preconditions the State has established for a waiver of sovereign immunity.[9]

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[8]As the court of appeals noted, the Federal Rules of Civil Procedure do not authorize a "counterclaim-in-reply." The court of appeals relied on the holding in *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1525 (9th Cir. 1985), for the proposition that a counterclaim-in-reply may be used where the claims are compulsory.

[9]Such a holding also conflicts with the rule that, even though the government waives its sovereign immunity to some extent when it files an action, "no waiver of immunity occurs to the extent the counterclaimant seeks an affirmative recovery."

The Ninth Circuit justified noncompliance with the notice requirements by reasoning that it would have been inequitable to require Briscoe to file a notice of claim here because the claims period had expired before the County filed its compulsory counterclaim. This rationale cannot withstand scrutiny. It is factually wrong and theoretically flawed.

On the facts, Briscoe had time to file its notice of claim after the County filed its counterclaim. Briscoe filed its counterclaim-in-reply on September 15, 1980. Yet the original plant completion date was June 29, 1980, the County extended that date 210 days, to January 25, 1981, and actual completion occurred on April 26, 1982. Consequently, no actual delay had yet occurred, and Briscoe had ample time to file a notice of claim *before* it filed its counterclaim for damages. Had Briscoe taken that step, the County would have had the opportunity to consider settlement, with full knowledge of Briscoe's claim for damages.

Moreover, it would not have been inequitable to require compliance. Briscoe initiated the litigation, and the County had no discretion over the timing of its compulsory counterclaim. As soon as Briscoe filed suit against the County, the County had to raise its compulsory counterclaim or waive it under the strictures of the Federal Rules of Civil Procedure. Thus,

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Chamberlain v. United States, 687 F. Supp. 1534, 1536-37 (S.D. Ala. 1988); *United States v. Timmons,* 672 F.2d 1373, 1379-80 (11th Cir. 1982). This rule was set out in *Frederick v. United States,* 386 F.2d 481, 488 (5th Cir. 1967), on which *Capital Convalescent* relied. *Compare* 92 Nev. at 151-52, 547 P.2d at 680 *with* 386 F.2d at 489. Thus, even if the court of appeals were correct that Briscoe need not comply with the notice statute because the County first sought a monetary recovery, the waiver applies only to defeat the County's claims, and cannot entitle Briscoe to any affirmative damages.

Briscoe, not the County, dictated the timing of the County's damages claim and the court of appeals identified no justifiable basis for not requiring strict compliance with the notice-of-claim statute in these circumstances.

Although Nevada law recognizes that if the government first sues, the claimant may file a counterclaim without statutory notice, *e.g., State v. Capital Convalescent Center*, 92 Nev. 147, 547 P.2d 677 (1976), here the claimant, not the County, initiated the litigation. At most, the County waived compliance with the notice statute to the extent of permitting the claimant to defeat the County's claims. *E.g., United States v. Timmons*, 672 F.2d 1373, 1379-80 (11th Cir. 1982). But here the decisions below went much further. They subvert totally the statutory requirement of strict compliance with the Nevada claims statute, thereby increasing the burdens on the Nevada and federal judicial systems.

III. CUMULATIVE TRIAL ERRORS DEPRIVED CLARK COUNTY OF A FUNDAMENTALLY FAIR TRIAL

In addition to these plain legal errors, the courts below sanctioned errors in the way the trial was conducted,which denied the County a fair trial. The huge verdict and judgment here was obtained as the result of: (1) a twelve-week continuance in the middle of the plaintiff's case that cemented the jury's predictable pro-plaintiff leanings at that stage of the proceeding; (2) the submission to the jury of unrebutted argumentative charts that allowed Briscoe an unfair opportunity to draw for the jury inferences that were never proved or argued at trial; and (3) misleading special interrogatories that instructed the jury to cumulate redundant and overlapping damages.

A. The Continuance

After 18 days of plaintiff's testimony, the district judge, on his own motion, continued the trial from December 30, 1985 to March 11, 1986, to avoid having FICA taxes deducted from his salary. The County moved for a mistrial and submitted an affidavit by Dr. Elizabeth Loftus, a renowned expert in jury decisionmaking, who concluded:

> In summary, I believe the recess in the trial is likely to have helped jurors to have solidified whatever pro-plaintiff orientation they had developed by hearing a major portion of the plaintiff's case, and I believe the process of refreshing the jurors' memories, which will inevitably occur, further disadvantages the defendant.

(App. 93a-94a).

The court of appeals concluded that the district court had not abused its discretion in denying a mistrial, because Dr. Loftus explained that the pro-plaintiff orientation had been developed by hearing "a major portion of the plaintiff's case" and the County offered no evidence to show that the jury had heard "a major portion of the plaintiff's case." (App. 12a).

Yet the opinion overlooks the evidence of record that Briscoe had already presented 14 witnesses whose testimony covered 3,666 pages of transcript. In the 24 days of Briscoe's case-in-chief after the continuance, Briscoe presented 16 witnesses whose testimony covered 4,213 pages of transcript. Substantively, the record discloses that Briscoe's witnesses before the continuance covered all aspects of its case except damages. Before the continuance, fact and expert witnesses testified on the major technical construction issues and on the key issue of engineering responsibility.

Given the unrebutted evidence of record and affidavit of Dr. Loftus, and given that the delay was ordered sua sponte by the district court, unjustified by any emergency or need connected with the trial, the district court abused its discretion in denying a mistrial. The continuance introduced an element of uncertainty that is inappropriate in our system of trial by jury.

B. Argumentative Reference Charts

The district court instructed Briscoe to prepare charts to demonstrate the causal link between each alleged delay-causing event and the corresponding alleged breach of contract (RT 8401-02). The charts were supposed to be used during Briscoe's closing argument and the County was supposed to have an opportunity to respond to them in its closing argument (App. 33a-34a).

Rather than comply with the court's directive, however, Briscoe waited until *after the County's final argument* to produce its reference charts that asserted connections between breaches and effects that the trial court found had neither been proved nor argued (App. 34a).[10]

Although the County objected to submitting the argumentative charts to the jury without an opportunity to rebut them, and the court recognized that Briscoe was at fault for surprising the court and defense counsel with the charts at the eleventh hour (RT 15,640), the court allowed the charts to go to the jury. In denying the County's motion for judgment notwithstanding the verdict or a new trial, the court found that

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[10]Indeed, the court explicitly stated that "no Briscoe witnesses had directly tied the 10 breaches of contract to specific delay-causing events which were the consequences of the breaches of contract . . . ." (App. 35a).

any error was harmless because the charts "did not clearly make the connection between each claimed breach of contract and each delay-causing event," and the jury "could not have intelligently relied upon the charts at all." (App. 35a-36a). The Ninth Circuit also embraced this rationale.

The courts below relied on a harmless error analysis lacking in factual or legal justification. The trial court expressly instructed the jury that the charts were designed to assist them (RT 15,590, 15,656-58), and the jury obviously could have relied on them in reaching its verdict (*see* App. 41a-60a). Accordingly, the error in submitting this argumentative, unrebutted evidence to the jury could not have been harmless.[11]

C. Special Interrogatories

The district court submitted special interrogatories to the jury. Each special interrogatory set forth an alleged breach of contract based on Briscoe's amended complaint. Although the district court and the court of appeals acknowledged that some of the special interrogatories were "poorly drafted" and "susceptible of misconstruction and overlap," both courts concluded that the jury would not have been misled (App. 20a, 33a).

Yet even a casual reading of the interrogatories shows that the jury was invited to award overlapping, duplicative damages. For example, interrogatory eight directed the jury to award delay damages against the County if it found that the County "delayed, disrupted and interfered with the performance of work." In

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[11]Even if the court of appeals was correct that the charts lacked any evidentiary basis, and were repetitive, vague, confusing, and absurd, there is no basis for concluding that the jury could not have relied on them. *See, e.g., Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954) (introduction of improper material into jury room presumed to have influenced jury deliberations).

interrogatory ten, the court directed the jury to award delay damages against the County if it found "that in addition to interfering with scheduling, the County unreasonably interfered with the performance of [Briscoe's] work."[12]

The jury could hardly have avoided awarding duplicative damages, given these interrogatories. As the court of appeals noted, the trial court expressly instructed the jury to consider the interrogatories "one by one, one at a time"; at no point, despite specific objection by the County (RT 15,618), did the court instruct the jury to eliminate overlap when the same days of delay were caused by one or more alleged breaches. Accordingly, the jury may well have felt compelled to award duplicative damages.

In sum, the special interrogatories did not adequately present the contested issues to the jury, did not submit the issues fairly, and did not clearly submit the ultimate questions of fact. *See Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975). The County was seriously prejudiced when the court strictly instructed the jury to answer the interrogatories one at a time and then cumulate the results, without giving any cautionary instruction about duplication of damages.

This potential for an award of duplicative damages was compounded when the jury considered the reference charts corresponding to each special interrogatory. For example, the chart corresponding to the eighth interrogatory lists 34 consequences, while the tenth lists 33. Fully 31 of these "consequences" are identical. Thus, not only did the special interrogatories invite an award of duplicative damages, but the reference charts encouraged the jury to follow that improper course.

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[12]The jury found 100 days of delay under the eighth interrogatory and 115 under the tenth.

The combined effect of these three rulings below – the continuance, the jury's use of argumentative reference charts, and the special interrogatories – leads inescapably to the conclusion that the County was denied a fundamentally fair trial.

CONCLUSION

For the reasons set forth, the County submits that the petition for a writ of certiorari should be granted.

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